NATIONAL LABOR RELATIONS BOARD

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SPORTS LAW
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"PROFESSIONAL SPORTS, COLLECTIVE BARGAINING AND THE LAW"

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The aftermath of the 1994-1995 baseball conflict has triggered a searching and sometimes searing reevaluation of the game itself and the way in which it is both played and presented. All the old and well-worn canards about talented athletes shifting to other sports, the lack of superstars in baseball and the length of the game, etc. have now become common cocktail party chatter throughout the land.

But the fact is that the fundamental crisis in baseball in 1995 and in aspects of the law which govern it lie in the ability (or current inability) of the parties to resolve their differences at the bargaining table and to get on with the business of the game itself. It seems clear that frustration with the game now, demonstrated most graphically by plummeting attendance figures, is directly related to fan frustration with both the conduct of the negotiations during the past year or so, as well as lack of positive developments at this moment off the field, not on the field.

It is imperative that both the Major League Players Association and the Major League Players Committee sit down and commence bargaining in these weeks leading up to the All-Star Game so that the public and fans can focus on the pennant races and the new statistical achievements of individual players without the distraction which seems to plague all professional sports in our time.

In truth there is little about the game of baseball that needs to be changed. Strikes (on the field that is) should be called at the letters -- as they were just a few years ago (anyone over 45 can recall Mel Allen or Red Barber declaring: "Strike called at the letters."). Commercials should be diminished between innings. Perhaps even some of the off-the-mound and out-of-the box fidgeting can be modified.

But the fact is that the grand majesty of the game remains intact as it has been for most of this century. True, the designated hitter rule -- designed to diminish the cerebral elements of manager strategizing in the dugout -- has changed some things. But the most prominent consequence has been more line up switches by National League managers, again exaggerating an attribute which baseball possesses much more than its rival and more immediately exciting and gratifying sports leagues. What the parties on both sides of the bargaining table need more than anything is to concentrate on the issues which divide them and to think creatively about compromises which can produce peace in lieu of conflict.

Labor law has become the dominant element in the resolution of professional sports disputes. Last year the Board concluded a significant resolution of a professional football dispute, arising between the National Football League and the National Football League Players Association. The settlement agreement included $30 million in backpay, bonuses, and interest to over 1,300 players who participated in a 1987 strike.

The '94-'95 baseball dispute demonstrates dramatically the relevance of contemporary labor law to modern professional sports issues. But our National Labor Relations Act which provides a secret ballot method of resolving disputes about union

recognition as well as a balanced system of unfair labor practice prohibitions applicable to both management and labor is only a part of the legislative scheme of dispute resolution.

In all the major sports, strong unions, protected in substantial part by antitrust law, as well as the National Labor Relations Act, have negotiated comprehensive collective bargaining agreements. In baseball, football, basketball and hockey, the unions have negotiated comprehensive collective bargaining agreements providing for not only a wide variety of benefits and minimum standards for those whom the union represents, but also grievance arbitration machinery which resolves a wide variety of conflicts between the parties.

The most prominent illustration of this in baseball was the series of arbitration cases on the issue of collusion in the mid-1980's in which the Players Association prevailed in establishing collusion and free agent bidding between the owners in violation of the collective bargaining agreement. As you undoubtedly know, these provisions grew out of the fear of the owners that the players would operate in concert and hold out in connection with their individual contracts -- the example of Sandy Koufax and Don Drysdale provided by the owners as a prime illustration of this abuse of individual bargaining. Thus, the union sought comparable restraint on concerted activity by owners in the free agent market.

Salary arbitration has been an important part of the baseball agreement since 1973. Established in response to the Curt Flood litigation, this form of arbitration has been a vehicle for protecting the more junior players who could not avail themselves of the agreement. The owners appear to have disliked salary arbitration even more than free agency -- and this has been at the center of collective negotiations since the mid-'80s when the '85 collective agreement reduced salary arbitration eligibility from 2 to 3 years.

The 1986 MVP and Cy Young winner Roger Clemens could not use salary arbitration and had to accept the unilateral decision of the owners, producing a firestorm of criticism by the players. The 1990 agreement produced a compromise which permitted the players to expand eligibility -- and salary arbitration was once again back at the heart of the 1994-1995 negotiations.

I would suppose that nothing established labor law more clearly in professional sports than the Board's March 26 decision to seek injunctive relief against unilateral changes in free agency and salary arbitration instituted by the owners prior to that time. The National Labor Relations Act, which my agency, the National Labor Relations Board administers, is designed to establish both freedom of association and protection against discrimination on account of union activities or the lack thereof, but also procedural rules once the collective bargaining process is established. It is these procedural rules of good conduct, so to speak, which were at issue in the unfair labor practice proceedings before the Board and the courts 3 months ago. My own judgment is that there was reasonable cause to believe that those rules were not adhered to in the 1994-1995 negotiations and thus I voted to seek the injunctive relief which Judge Sotomayor granted.

The significance of the intervention of the Board in 1995 was that the baseball season was resumed. My colleagues on the Ontario Labor Relations Board from north the border were able to accomplish the same result by ruling in the less publicized umpires lockout which followed on the heels of the players dispute.

Meanwhile, professional basketball has provided yet another example of the kind of conflict that arises under federal labor law. Again, the dispute arises out of negotiations which have taken place over a substantial period of time. The basketball players have acceded to restraints which have not existed in baseball, i.e., a salary cap arising out of the economic adversity that plagued that sport in the early '80s. Last week a decertification petition was filed with the Board and the hearing is scheduled to take place July 5 on this matter in New York City. This dispute (which is both internal to the union and with the owners) may have prompted the parties to go back to the drawing board. Whatever the immediate consequence it reflects apparent tensions between both well publicized superstars like Michael Jordan and Patrick Ewing as well as a concern involved in other sports disputes about possible player concessions to the owners.

The legal issue in the basketball case could involve the questions of whether the proposed contract entered into was a bar to any kind of decertification petition and that, in turn, sometimes depends upon when the petition was filed, vis-à-vis the contract negotiated as well as procedures such as ratification for implementing it.

But labor law is not the only feature of baseball and basketball negotiations. The Courts of Appeal for the District of Columbia and the 2nd Circuit in New York have concluded that labor law is dominant where a collective bargaining relationship exists even subsequent to the time that the parties have bargained to impasse. This means that antitrust law has no role to play unless the relationship between the parties disappears altogether -- and the way in which this can be achieved most clearly is through the filing of a decertification petition which leads to the elimination of the union and the collective process. Accordingly, under existing law, the basketball players who filed the decertification petition would not only rid themselves of the union with which they may be dissatisfied but gain through the one method available to them, i.e. the threat or actuality of an elimination of the collective bargaining process itself. Surely incentives to gain access to antitrust remedies at the price of collective bargaining is not a good result under a federal labor policy which promotes collective bargaining.

The reason why antitrust law remains important is that constraints exist in professional sports in terms of player mobility which do not exist elsewhere. This is presumed to be necessary to promote parity attendance, fan interest and ultimately the profitability of the game itself -- though the antitrust law has provided protection to such restraint principles through the so-called statutory labor exemption to antitrust law -- protection which now apparently applies in every instance other than decertification itself

One of the interesting developments from the 1995 baseball injunction and back-to-work agreement is that players are moving with much more frequency among teams -- and not as a result of bidding clubs and a free agency. My team, the Boston Red Sox for instance, has only 8 members of the 1994 team on the 25 man roster. Most of the other 17 were obtained on waivers for minimum salary rather than major contracts. Even those contracts that could be characterized as major ones, are considerably below those that have been obtained in recent years.

All this suggests that the constraints imposed and ultimately negotiated might conceivably be less important than the that which has been ascribed to them. The fact that the Red Sox still have a comfortable first place perch in the American League Eastern Division as well as the success of the Montreal Expos in '94 -- they trail only the Phillies and Braves in the Division this year -- may induce baseball and other sports to emphasize old fashioned ingenuity and creativity. These characteristics, both before and since the advent of free agency seem to have been the best method for promoting team success.

In any event, this is a matter for baseball and other professional sports at the bargaining table. I call upon both sides -- the players and the owners to commence bargaining forthwith. That is the intended remedy contained in our March 26 decision to intervene in the baseball dispute. This is always the best method for resolving differences between labor and management in our society.

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